FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U.
FILED.
OCT 26 1906
JAMES H. McKENNE
CLE

No. 76.

AMELIA C. TRAVERS, CHARLES E. TRAVERS, JOHN H. TRAVERS, JOSEPH TRAVERS, JAMES W. TRAVERS, AND KATE M. M. OWENS, APPELLANTS,

vs.

MARIA L. REINHARDT, LOUIS F. REINHARDT, MARGARET M. MITCHELL, ELIZABETH MITCHELL, MARY L. WALLIS, SAMUEL WALLIS, ALICE V. ROHRER, WILLIAM H. ROHRER, SIDNEY MITCHELL, ANNIE MITCHELL, ANNIE E. TRAVERS, AND "THE SISTERS OF THE VISITATION," A CORPORATION, APPELLEES.

BRIEF FOR APPELLEES.

W. A. GORDON,
G. E. HAMILTON,
M. J. COLBERT,
J. H. GORDON,
For Appellees.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23452

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 76.

AMELIA C. TRAVERS, CHARLES E. TRAVERS, JOHN H. TRAVERS, JOSEPH TRAVERS, JAMES W. TRAVERS, AND KATE M. M. OWENS, APPELLANTS,

vs.

MARIA L. REINHARDT, LOUIS F. REINHARDT, MARGARET M. MITCHELL, ELIZABETH MITCHELL, MARY L. WALLIS, SAMUEL WALLIS, ALICE V. ROHRER, WILLIAM H. ROHRER, SIDNEY MITCHELL, ANNIE E. TRAVERS, AND "THE SISTERS OF THE VISITATION," A CORPORATION, APPELLEES.

BRIEF FOR APPELLEES.

I.

Statement of Case.

The original bill was filed on June 8, 1900, for partition or sale of certain real estate devised by the will of Nicholas Travers, of which the only parts now involved are certain lots in square 291, in the city of Washington. Incidentally

the bill prays for a construction of the will of said Nicholas Travers.

The complainants and certain of the defendants claim title through Elias Travers, a son of said Nicholas; the other defendants claim through the daughters of said Nicholas. Nicholas Travers died about the beginning of the year 1849, leaving as his heirs-at-law his sons, Nicholas, Jr., Joseph, James, and Elias, and his daughters, Sydney Virginia Mitchell, Mary Wynne, and Elizabeth Travers, known as Sister Mary Agatha. He died testate, and his will, dated July 10, 1840, was unsuccessfully contested by his daughters. In said will he made various devises to each of his sons, the devises in some cases being to said son, "his heirs and assigns forever, in fee simple," and in others to said son "and his heirs forever," the devise in the latter case being subject to a general provision in the following words:

> "With regard to the several estates hereinbefore devised to my several sons, it is hereby declared to be my will, and I do order and direct, as a general provision, that if any of my said sons should die without leaving a wife, or a child or children living at his death, then his estate herein devised to him, save and excepting those portions thereof expressly granted and so named to be 'in fee simple,' and which they can sell and dispose of as they think fit, shall go, and be invested in fee, to my surviving sons and the child or children of such as may be dead, such child or children representing the share of the father, but if either of my sons shall, at his death, leave a wife either with or without a child or children, such wife shall be entitled to her dower rights and privileges."
>
> Record, page 144.

All the property now involved was devised subject to the above general provision.

Nicholas Travers, Jr., died during the contest over the will of his father. Joseph Travers died September 12, 1882, intestate, leaving a widow, but no children. James Travers

died in October, 1883, leaving a will in which he devised his property in the District of Columbia in his brothers and sisters. James left no children; those claiming under his sisters allege that he left a widow, and those claiming under his brother Elias that he died unmarried. Elias Travers died in April, 1887, leaving children. Mrs. Wynne died in 1892 and Mrs. Mitchell in 1895, both leaving children. Elizabeth Travers died in 1897, testate. Those claiming under Elias Travers allege that under the provisions of the will of Nicholas Travers the entire title to the lots in controversy is vested in them, urging that on the death of Joseph, leaving no children, the property devised to him became vested in James and Elias as survivors, and that on the death of James without children the property devised to him became vested in Elias as survivor. On behalf of those claiming under the daughters of Nicholas Travers it is urged (1) that as both Joseph and James died leaving widows, the property devised to them was relieved from the operation of the general provision of the will; (2) that upon the death of Joseph it was agreed between his surviving brothers, James and Elias, and the three sisters that all the property devised to Joseph and James should be treated as free from the general provision of the will, and that such agreement was carried into effect by an equal division of the rents derived from the property devised to Joseph and James, and that such equal division continued to be made until the filing of the suit.

Sales having been made by trustees appointed by the court, the cause was referred to the auditor to ascertain the respective interests of the parties in the proceeds of sales and make distribution. The auditor having found adversely to those claiming under Elias Travers, exceptions to his report were filed by them. The decree of the lower court overruling these exceptions having been affirmed by the Court of Appeals, the cause is brought here for a reversal of said decree.

II.

Points.

First. Joseph Travers and James Travers died seized of a title in fee to the property devised to them by their father, provided they left widows surviving them.

Second. Both Joseph and James Travers left widows surviving them.

Third. Under the agreement between James and Elias Travers and their sisters, after the death of Joseph Travers each sister acquired an equal interest in fee with the surviving brothers in the property devised to Joseph and James, and those claiming under Elias Travers are estopped from denying the title of the sisters in such interests.

First.

Joseph Travers and James Travers died seized of a title in fee to the property devised to them by their father, provided they left widows surviving them.

By the will of Nicholas Travers all devises to his sons were in fee, the variation in the wording by the addition "in fee simple" in no way affecting the estates devised. There is nothing in the will changing the devises in fee, except the general provision attached to those devises in which the words "in fee simple" are omitted. The various codicils republish the will except as therein specifically revoked.

It has been suggested by those claiming under Elias Travers that the third codicil, in which the testator stated that in his will he had declared that the "real estate not devised by the use of the words 'in fee simple' shall be held by such devisees for life, and then according to stipulations

and restrictions as therein contained and declared by said will," would indicate his intention not to pass a fee unless the words "in fee simple" were used.

It was clearly not the intention of the testator to devise a life estate unless the words "in fee simple" were used, as in that case the property in square 291 would not have passed to the child or children of a devisee had he left any; and as it could go over to the surviving brothers only upon the devisee dying without leaving "a wife, or child or children," the testator would have died intestate as to the fee in said lots.

The third codicil republishes the will and does not revoke or alter its provisions, but simply gives an inaccurate recital of what is provided in said general provision. The devises to the sons are, therefore, neither revoked or modified by said recital, for while explanatory expressions may aid in the construction of doubtful words, they cannot warrant the rejection of words that are clear.

Cole *vs.* Wade, 16 Ves., 46.
In re Smith, 2 Johns. & H., 594.

The intent of the testator as ascertained from the will must prevail. The will speaks for itself, and it is the intention of the testator as expressed in said will which is to govern, and this must be judged exclusively by the words of the instrument as applied to the subject-matter and the surrounding circumstances. Every expressed intention of the testator must be carried out where it can, and such a construction will, if possible, be adopted as will uphold the will and bring it as near reason and good sense as possible.

I Redfield on Wills, 433 and 434.

The will is explicit in its terms. The devises are in fee, subject to the provision "that if any of my sons should die without leaving a wife, or a child or children living at his death, then his estate herein devised to him * * * shall

go, and be invested in fee, to my surviving sons." These words, "without leaving a wife, or child or children," are used three times in the will, showing deliberation and care in the selection of words expressive of the testator's intention. There are no words used throwing doubt upon the intention of the testator, and if recourse is had to his words, the intention is clear and unambiguous.

How can the intention of a testator be arrived at except by his words, especially when his words, as in this case, are clear and unambiguous? It is urged by those claiming under Elias that the word *"or"* should read *"and,"* so as to make the clause read "should die without leaving wife *and* child or children living at the time of his death." This could not possibly have been the intention of the testator, as thereby the children of the devisee would have been deprived of any benefit if the wife should not be living at the time of his death. That is to say, if any of the brothers should have a wife and children and the wife shall die before her husband, the children would take absolutely nothing at the father's death—something which, under no possible theory, could the testator have intended.

It is not proper to conjecture what was the intention of the testator, and it can only be determined by the language which he uses, fairly construed. The estate created by the use of the word "or" is an entirely different estate from what would have been created by the use of the word "and," and the change of "or" into "and" can only be made when the intention of the testator is clear and beyond doubt.

No word in a will can be rejected and another substituted in its place without the clearest certainty that such was the intention of the testator.

I Redfield on Wills, 472.

It seems to be admitted on all hands, by the experienced and able writers and judges, that no liberty of transposition or supplying of words is allowable unless in furtherance of the most unquestionable purpose of the testator.

I Redfield on Wills, 470.

The safest course is to abide by the words unless upon the whole there is something amounting almost to demonstration that the plain meaning of the words is not the meaning of the testator.

Cooke *vs.* DeVandes, 9 Ves., 195-205.

It is the duty of the court to give effect to all the words of a will if by the rules of law it can be done, and when words occur in a will their plain and ordinary sense is to be attached to them unless the testator manifestly applies them in some other sense. We may indulge in conjectures, but the law does not decide upon conjectures, but the plain, reasonable, and certain expressions of intent found on the face of the will.

Wright *vs.* Denn, 10 Wheaton, 239.

There is no rule of more universal application than that the plain and unambiguous words of the will must prevail, and are not to be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances, or conditions, either of the testator, his property, or family.

I Redfield on Wills, 430.

There is a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense unless some obvious inconvenience or incongruity would result from so construing them.

Doe *vs.* Jessup, 12 East., 288.

I Redfield on Wills, 477, note.

No change will be made where it will do violence to the expressed intention of the testator.

Van Vetchen *vs.* Pearson, 5 Paige, 514.

The American cases seem to have required very clear evidence that the word "or" was used for "and" to justify the

substitution of one for the other—evidence amounting almost to certainty.

I Redfield on Wills, 487, note.

With this doctrine concurring, the court of Appeals says in this case (Rec., p. 205):

> "We agree with the opinion expressed by the auditor and the learned trial justice, that there is no expression of such a controlling intention as to require this substitution. The words used are plain and unambiguous. This being so, they must be given their ordinary and usual meaning, and cannot be controlled by conjecture."

A careful examination of the most recent cases upon this point cannot fail to convince any one that the liberality heretofore taken by courts in substituting "and" for "or," and *vice versa*, especially in early cases, have received very slight encouragement for the past few years.

I Redfield on Wills, 476.

While the word "or" is changed into "and," and *vice versa*, it appears only to be done where the change prevents the heirs of the first taker from being disinherited, and never where the change would have the effect of disinheriting such heir.

Jarmin on Wills, 506, 507, 525.
Raborg *vs.* Hammond, 2 Harris & Gill, 53.

Where a devise to A, and if he die without arriving at 21 years or having issue, then over, it is clear that both events must concur to pass the estate over.

I Redfield on Wills, 481.

As the will is explicit in its terms and shows deliberation and care by the testator in the selection of the words used; as there is nothing to show that any incongruity or incon-

venience would result from construing the words of the will in their plain and ordinary sense; as the change of the word "or" into "and" would create an entirely different estate from that created by the will, and would have prevented the children of the devisees, had they left any, from inheriting—a result that could not have been contemplated by the testator; as the change from "or" to "and" would entirely disinherit the children if the wife had died in the lifetime of her husband; and as there is no element in the will—certainly no element amounting to clearest certainty—showing any intention on the part of the testator to use any except the words used, and those words in their ordinary acceptation, it is urged that the will should stand as written, and that the estate devised would not go over to the surviving sons, provided the original devisee died leaving either a wife or a child living at the time of his death.

SECOND.

A. Both Joseph and James Travers left widows surviving them. The fact that Joseph left a widow is admitted, and it is urged that James also left a widow. In support of this contention, Sophia V. O'Brien, who it is claimed is the widow of James, testified that her maiden name was Grayson; that she met James Travers first in 1864, when she was seventeen years of age, and later in Alexandria, Virginia, where, on August 15, 1865, a ceremony of marriage was performed between them, and, believing they were married, she went to live with him as his wife, and so lived with him continuously until his death, on November 1, 1883, at Point Pleasant, New Jersey (Rec., p. 104); that immediately after said ceremony in Virginia she and James Travers went to Shrewsbury river, in the State of New Jersey (though Mrs. Travers in her testimony was uncertain whether that place was in New Jersey or New York), and lived there for several weeks at the hotel as man and wife (Rec., p. 105); that they

then rented a place in Belair, Harford county, Maryland, where they lived until they purchased property in Talbot county, Maryland, where they lived continuously from 1867 to 1883 (Rec., p. 106), when they sold the farm and, on account of Mr. Travers' failing health, went to Point Pleasant, New Jersey, where he died (Rec., p. 113); that from the time of the marriage, in August, 1865, to the time of the death of Mr. Travers, in November, 1883, they lived continuously as man and wife, whether in Maryland, the District of Columbia, or New Jersey, and that during all that time James Travers regarded her as his wife and introduced her and held her out as such in the communities in which they lived, and that they were regarded as married in said communities; that she always regarded herself as his wife and joined him in deeds as such (Rec., p. 151); that he executed wills in which she was named as his wife, and under one of which she qualified as executrix (Rec., p. 105); that she believed the marriage in Virginia was a valid marriage until five or six years later, when she was informed that the ceremony had been performed by a friend of Mr. Travers, whom she thought was a clergyman, and that Mr. Travers always said they were as much married as if they had been married before a priest or minister (Rec., p. 114).

B. A deed made September 27, 1867, from James Travers, in which Sophia V. Travers joined and duly acknowledged as his wife (Rec., p. 159); a will written in the handwriting of James Travers, dated February 8, 1881, in which certain devises were made to his wife, Sophia V. Travers, and in which she is named as executrix (Rec., p. 159); a will of James Travers, dated October 5, 1883, executed at Point Pleasant, New Jersey, in which he bequeathed to his wife, not giving her name, the residue of his property while she remained his widow, and provided that in the event of his wife contracting another marriage she should possess as of her own right only one-third of the property, and under which she qualified as executrix (Rec., p. 280), and the

will of Elizabeth Travers, a sister of James Travers, in which she makes a bequest to Annie E. Travers, his reputed child, naming her as her niece (Rec., p. 367), were also placed in evidence.

No testimony of any kind was offered to contradict the above, though in the cross-examination of Mrs. O'Brien it was evident that inquiry had been made in the community in which she and Mr. Travers had lived as to his representations that she was his wife. George H. Rucker, clerk of the county court of Alexandria county, Virginia, however, testified that among the papers of his office there was no record of a marriage license having been issued to James Travers and Sophia V. Grayson between the years 1860 and 1878.

While it may be admitted that as the marriage in Virginia in 1865 did not comply with the statute of that State, said marriage, under the decision in Offield *vs.* Davis, 100 Va., 250, would have been void as to the status of the parties in that State and as to property there located, it must be borne in mind that the parties immediately left that State and never returned there, but subsequently resided in New Jersey and Maryland, and that the property in controversy is located in the District of Columbia, and that the status of Sophia V. as the wife of James Travers at the time of his decease does not depend upon the law in Virginia.

It has never been held that the law in the District of Columbia denied validity to marriages good at common law, and in fact the only dicta on the subject lean toward the validity of such marriages, even when contracted in said District. Judge Merrick, who was deeply learned in the law of Maryland as in force in the District of Columbia, said in Thomas *vs.* Holtzman, 18 D. C., 66:

> "In the first place, it is not at all apparent that it ever was the law that a marriage *in facie de ecclesiæ* was necessary for the purpose of legitimizing the issue. It is true that the Court of Appeals of Maryland in the last four or five years has decided that such was

> the law, but that decision is not binding on us. It is laid down by Blackstone that a marriage *per verba de presenti* without the intervention of a clergyman is a legitimate marriage. And both Story and Kent say that according to the universal understanding in this country, a marriage *per verba de presenti,* without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage."

If, therefore, a common-law marriage was contracted at any time between James and Sophia V. Travers, such marriage would be recognized in the District of Columbia.

The testimony as to the marriage in Virginia, and that from that time to the day of his death continuously James Travers recognized Sophia V. as his wife and introduced her as such in the communities in which they lived, and that she was generally recognized as his wife, is clear and positive. This testimony is uncontradicted, no attempt being made to contradict it, although the cross-examination shows that inquiry had been made in the community in which they lived in Maryland concerning Mr. Travers' representations that she was his wife.

During the residence in Maryland the execution in 1867 of the deed, in which she joined with him as his wife, shows his representation of her as such, and the certificate of the officer taking the acknowledgment that she was his wife shows that she was recognized in the community as such.

During the residence in Point Pleasant, New Jersey, Mr. Travers recognized her as his wife, in the most solemn manner possible, by executing a will wherein he named his "wife" (without giving her name) as devisee and executrix, and under which Sophia V. Travers was granted letters testamentary, qualified as executrix, and administered his estate. This will removes all doubts as to his recognition of her as his wife, for it provides *"in the event of my wife contracting another marriage,* then it is my will." She, as his wife, could not contract another marriage unless she had first contracted one with him.

The fact that letters testamentary were granted to her by the New Jersey court as the widow of James Travers, although her name was not given in the will, is conclusive proof of the reputation of marriage in that community; and the fact that his next of kin and heirs-at-law permitted her as "wife" to qualify as executrix and take under the devise to his "wife" shows conclusively that she was recognized by them as the wife of their brother.

The bequest in the will of his sister Elizabeth, a nun in the convent at Georgetown, to Annie E. Travers, the reputed child of James, as her "niece" (Rec., p. 164), should be received as evidence of reputation, so far as that sister is concerned, as to the marriage, and that James and Sophia V. Travers were man and wife.

These acts certainly constituted a marriage under the laws of New Jersey, and if a lawful marriage in that State it will be recognized as such in the District of Columbia.

In Atlantic City R. R. Co. *vs.* Gooding, 62 N. J., 394, it was held that a contract of marriage made *per verba de presenti* constitutes an actual marriage and is valid, and in Stevens *vs.* Stevens, 11 Dickinson Eq., 490, that a common-law marriage is good. Even though the marriage in Virginia did not constitute a lawful marriage in that State, it did constitute an agreement between the parties to accept each other as man and wife, thus constituting a marriage good at common law, and their stay in New Jersey immediately after said common-law marriage, and especially the residence in that State in 1883, prior to the death of James Travers, and their living there in compliance with the terms of the contract entered into in Virginia, made their status that of man and wife.

In Meister *vs.* Moore, 96 U. S., 76, this Court, after full consideration of the subject of common-law marriages and the construction to be given to statutes affecting them, held in regard to an informal marriage by contract *per verba de presenti,* that there can be no doubt that such a contract

constitutes a marriage at common law, in view of the adjudications made in this country from its earliest settlement to the present time.

Marriage is everywhere regarded as a civil contract, and though statutes in many States regulate the mode of entering into the contract, they do not confer the right. A statute may take away a common-law right, but there is always the presumption that the legislature had no such intention unless it is plainly expressed. A statute may declare that no marriage shall be valid unless solemnized in a prescribed manner, but such an enactment is very different from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publications of bans, or that it be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present consent. Such has been the rule generally adopted in construing statutes regulating marriages. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law unless they contain express words of nullity.

The Virginia statute, as the Michigan statute in Meister *vs.* Moore, does not contain "express words of nullity," and would under the construction given by this Court be a legal marriage; and though the statute of Virginia could regulate "the mode of entering into the contract," it could not "confer the right" to contract a common-law marriage, nor declare the same to be void except in that State; and the distinction between statutes which prescribe that certain formalities shall be complied with and those which declare such marriages to be void unless the prescribed formalities are complied with is clearly set out by the court.

In Meyer *vs.* Pope, 110 Mass., 314, it is held that where the marriage was entered into in good faith, believed by one or both parties to be valid, and followed by cohabitation, it was valid.

In Smith *vs.* Smith, 52 N. J., 207, the parties went from Vermont to Boston, and the ceremony was performed by a man whom the woman supposed was a clergyman; the parties then returned to Vermont and lived as man and wife. *Held,* that it was a valid marriage in Massachusetts and was recognized as such in New Jersey, where the land was situated.

The decision in Offield *vs.* Davis rendered in 1902 is not conclusive on this court, as in 1877 it decided, in Meister *vs.* Moore, in construing a statute in many respects identical with the Virginia statute, that a marriage similar to that now under consideration was vaild.

In Pease *vs.* Peck, 18 Howard, 598, Mr. Justice Grier said:

> "There are, it is true, many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decision of the State court on the construction of their own laws. But although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application: Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedents, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court has first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State court."
>
> See also Burgess *vs.* Seligman, 107 U. S., 20.
> Julian *vs.* Central Trust Co., 193 U. S., 95.

It has been urged that the testimony of Sophia V. O'Brien should have been rejected as unworthy of belief, because on cross-examination she admitted that in one particular she had testified falsely. A careful examination of her testimony and the circumstances under which she gave it does not warrant the application of the rule *falsus in uno falsus in omnibus.* She had no interest whatsoever in the subject-

matter of the litigation, and the false statement related to a matter not material to the determination of the cause. The temptation to shield the reputation of a girl whom she had reared and loved as a daughter was strong, and though she yielded to such temptation, her statements as to other facts might be entirely reliable. Her subsequent admissions as to the falsity of her statements in regard to the child were made voluntarily and under no apprehension of penalty, but she made no withdrawal of any statement made by her in her testimony concerning her relations to James Travers. Should, however, the rule be considered as applicable and her entire testimony be rejected, there would still remain (1) the deed executed and acknowledged by her in connection with James Travers as his wife; (2) the will of James Travers executed at Point Pleasant, and relied on by the complainants in their bill and the administration of Sophia V. Travers thereunder, and (3) the will of Elizabeth Travers, also relied on by the complainants in their bill; which said deed and wills established the facts that James Travers in the most solemn manner recognized Sophia V. Travers as his wife, and that she was recognized as his wife both in communities in which they lived and by the heirs-at-law and next of kin of James Travers.

The testimony of Sophia V. O'Brien as to the marriage in Virginia, the cohabitation as man and wife for nearly twenty years, and the general reputation that she and James Travers were married is not only clear, positive, and uncontradicted, but is corroborated by the documentary evidence offered; and said evidence is such as this court has prescribed in Maryland *vs.* Baldwin, 112 U. S., 490, and Jewell *vs.* Jewell, 1 Howard, 219, as admissible to establish the existence of marriage.

Considering the history of the connection between these parties as disclosed by the testimony in the case, it is asserted without fear of contradiction that the books contain no stronger case of a perfect common-law marriage than that between James and Sophia Travers.

THIRD.

Under an agreement between James and Elias Travers and their sisters, after the death of Joseph Travers, each sister acquired an equal interest in fee with the surviving brothers in the property devised to Joseph and James, and those claiming under Elias Travers are estopped from denying the title of the sisters in such interest.

The heirs and devisees of the three sisters in their answer deny that the heirs of Elias Travers are entitled to more than a fourth interest in said lots, and claim that they are entitled to the other three-fourths; claiming, independently of the will of Nicholas Travers, that on the death of Joseph it was so agreed between his surviving brothers and sisters, and that the will of James devising equally to all was accepted by them and Elias; and that since the death of Joseph the rents from the lots in square 291 devised to him have been collected by an agent and divided, until the death of James, equally between James, Elias, and the sisters, and since the death of James equally between Elias and the sisters, and since their death equally between their heirs and devisees; and that since the death of James the rents from the lots devised to him have been collected by an agent and divided equally between Elias and the sisters, and since their death equally between their heirs and devisees.

To establish the agreement between the brothers and sisters that the lots in square 291 devised by the will of Nicholas Travers to Joseph and James Travers should, after their death, be held equally between the three sisters and the surviving brothers, the defendants, claiming under the sisters, offered the following testimony:

Mr. Stellwagen, who testified that he had been a member of the firm of Fisher & Co. (of which firm Thomas J. Fisher was the head) prior to and since 1882; that immediately after the death of Joseph Travers, in 1882, his

firm began to collect the rents from the real estate of Joseph, including the lots in square 291, and distributed the same equally between James and Elias and the three sisters until the death of James, and after the death of James equally between Elias and the three sisters. During the life of the widow of Joseph this division was made subject to the payment to her of one-third of said rents. Immediately after the death of James Travers, in 1883, his firm began to collect the rents from the real estate of James, including the lots in square 291, and distributed said rents equally to Elias Travers and the three sisters. That since the time his firm began to collect said rents and distribute the same, it has continuously collected and distributed them to the filing of the suit; that statements of rents collected and of the distributive shares were furnished said parties, certain of which statements offered in evidence were identified as originals; that such collections were made and distributed, and checks given in payment were accepted without objection, and that during the whole time no exception or complaint was made by James or Elias during their lives, or by the heirs of Elias after his death; that the collections were made by virtue of letters of attorney from James, Elias, and the sisters, which were offered and filed in evidence; that the distribution was made under instructions from Mr. Fisher, the head of the firm, who informed him that it was so distributed under agreement between the parties interested; that Mr. William B. Webb consulted with Mr. Fisher and Elias Travers in regard to the estate, and that his impression was that Mr. Webb represented all the parties in the arrangements that were made. He never saw and had no knowledge of the agreement otherwise than as mentioned by Mr. Fisher in his instructions as to the distribution.

Letters were introduced from the late William B. Webb, a lawyer then living in Washington, to two of the sisters, in which he informed them that the question as to how Joseph held the property in square 291 was considered im-

mediately after his death, and that an opinion had been given by Mr. Totten that he held the same in fee, and that Elias had accepted this interpretation and instructed him to prepare an agreement for the signature of all providing that the property should be held in equal interests by the surviving brothers and sisters and all controversy be at an end, and that he had prepared powers of attorney to be signed authorizing Mr. Fisher to collect and distribute the rents; also letters from Mr. Fisher acknowledging the receipt of the attorneys; also letters requesting Mr. Fisher to advance $500 to Mrs. Wynne from rents collected; also letters from Elias and Elizabeth Travers in regard to another advance to Mrs. Wynne; also letters from Fisher & Co. showing these advances to have been made; also entries in books of Fisher & Co. showing said advances and their payment from Mrs. Wynne's share of rents collected; also the will of James Travers devising his estate equally to his brother and sisters; also letters showing that when James was on his deathbed his brother Elias and Mr. Fisher were summoned to New Jersey; also lease in which Elias joined with his sisters, reciting that they were heirs-at-law of James.

All of this testimony is objected to as being hearsay and irrelevant.

It is claimed that in the absence of direct testimony from actors all this testimony is admissible as a part of the *res gestæ*, being the declarations and acts of the parties at the time the rents began to be collected and distributed by Fisher & Co. and the circumstances surrounding and accompanying the action of Fisher in this regard.

One fact appears beyond dispute by the testimony of Mr. Stellwagen, namely, that from the death of Joseph and James to the filing of the suit, the rents from the lots in square 291, which had been devised to Joseph and James by their father, were collected and distributed equally between the brothers and the sisters and those claiming under them,

and that the rents so distributed were accepted by the respective parties without demur or protest.

This condition of affairs requires some explanation as to the reason for such distribution of the rent. The sons were fully advised as to the provisions of their father's will and had contended that under said will they took the lots in square 291 subject to survivorship, and when Nicholas, Jr., died unmarried, the surviving sons exercised the right of survivors and divided the lots in said square devised to him among themselves.

If the will of Nicholas did not pass a fee to Joseph and the lots in square 291 on his death went to his surviving brothers, then after his death James and Elias would have taken as survivors and the rents would have gone to them equally. Under the same condition, on the death of James the lots in square 291 devised to him would have been vested in Elias as survivor and all the rents would have gone to him. In neither case would the sisters have been entitled to any interest in said lots or in the rents derived therefrom. Immediately, however, on the death of Joseph the rents were collected by Fisher & Co., on authority of duly executed powers of attorney, not only from the two surviving brothers, but from the sisters also, and distributed equally among them, and this without complaint or protest from either brother. This distribution of rents is so different from what would have been the case had the brothers claimed as survivors and not waived the rights they had, that the circumstances producing this result must be shown and the causes explained. This result could not have been the result of accident, and, if capable of explanation, testimony to explain the condition of affairs is admissible, even though no agreement can be found, as all the actors, James Travers, Elias Travers, Mrs. Wynne, Mrs. Mitchell, Elizabeth Travers, Mr. Fisher, and Mr. Webb, are dead. Were it otherwise the rules of evidence would be the means of denying justice instead of advancing it.

Can it be successfully contended that because all the actors are dead no explanation can be made as to how this condition of affairs took place?

> "Hearsay is often admitted in evidence as part of the *res gestæ*, the meaning of which seems to be that where it is necessary, in the course of a cause, to inquire into the nature of a particular act and the intention of the party who did the act, proof of what the party said at the time of doing it is admissible evidence for the purpose of showing its true character."
>
> Kolb *vs.* Whitely, 3 G. & J., 197.

In this cause the judge quotes from Starkie on Evidence, vol. 1, page 19:

> "The necessity of resorting to presumptive evidence is manifest. It very frequently happens that no direct testimony can be procured, and often when it can be had it is necessary to try its accuracy and weight by comparing it with the surrounding circumstances. From what has been said it seems to follow that all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means and afford any fair presumption or inference as to the question in dispute, for, as has already been observed, so frequently is the failure of evidence from accident or design, and so great is the temptation to the concealment of the truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected."
>
> "Where the parties against whom the evidence is offered were privy to the act, the objection ceases; it is no longer *inter alios*, and in general where the evidence is offered as a mere fact which is connected with the matter in dispute, and not with a view to affect the parties otherwise than as the actual existence of the fact affects the matter of the transaction itself, then although it was a transaction between others, yet as a mere fact and part of the *res gestæ* it is evidence."
>
> Starkie on Evidence, vol. 1, page 52.

It is a general rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them and accompanying the transaction at the time of the principal fact, may be given in evidence in a controversy as part of the *res gestæ* which are calculated to show the nature of the act and are in harmony with it. The declarations or acts must be the natural and inseparable circumstances of the principal act in controversy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction and must be calculated to unfold its nature and quality.

Bradner on Evidence, p. 485.

In Dawson *vs.* Galloway, 18 Ga., 580, in a case of joint possession it was held that such possession was sufficient to admit evidence of the separate contemporaneous declarations of either possession as characterizing the joint possession. In this case the joint participation in rents created a joint possession of the estate.

Sometimes entries made by third parties or letters sent by them are original evidence; these entries must possess substantially the characteristics requisite in the case of verbal declarations which are a part of the *res gestæ* and the writer must have been authorized to make it. So the writing itself must be relevant to the transaction with which it is sought to be connected, and must relate to it and be contemporaneous with it and illustrate it.

Underhill on Evidence, p. 79.

The declarations and the act must make up one transaction. The theory justifying this course is that where such declarations are thus coupled with a probable act they receive confirmation from it.

All the testimony offered by the defendants comes within the rule above stated, being acts allied to and explanatory of the transaction and contemporaneous with it.

The rents were collected by Fisher & Co., who had not previously collected them, and the letters of attorney show the authority for collecting them. They could not have been collected without the authority of James and Elias; and should it be urged that said letters only covered the property in which Joseph had an undisputed fee, the fact that rents from lots in square 291 were collected negatives this objection. After the collection of these rents no distribution could have been made without the consent and direction of James and Elias. They were, however, distributed equally between the brothers and sisters, and Mr. Stellwagen testifies that this distribution was made by him under direction of his chief, Mr. Fisher, who stated that it was under an agreement of the Travers heirs. In the absence of this argeement, does not the contemporaneous statement of Mr. Fisher show the nature of said agreement, and is it not in harmony with and forming a part of the very transaction? Is Mr. Stellwagen debarred from testifying as to directions received from his chief, and the reasons given by such chief for such directions, and upon which the firm acted and was responsible? If such a rule obtains, surviving members of partnerships would be debarred from explaining the reason for the action of the firm in all cases where a deceased partner had alone conducted the preliminaries of the transaction.

Further light is thrown on the transaction by the contemporaneous letters of Mr. Webb to Elizabeth Travers and Mrs. Mitchell. These letters state that he had been consulted by Elias Travers on the death of Joseph, and that in his opinion Joseph died seized in fee of the lots in square 291; that Colonel Totten, acting for the railroad company, had so reported to Elias Travers; that Elias Travers had accepted Colonel Totten's opinion as correct, and had instructed him, Webb, to prepare an agreement for all the heirs to sign, which would give the lots to the brothers and sisters, and that as a preliminary measure he had prepared letters of attorney authorizing Fisher & Co. to collect the rents. Does

not Mr. Webb's statement agree with those of Fisher and Stellwagen, and show the declaration of the parties to have been in conformity with what actually occurred? These written statements of Mr. Webb are corroborated by the production of the letters of attorney referred to by them and on the authority of which the rents were actually collected. The lease from Elias and his sisters, as heirs of James, to Smith further establishes the fact that Elias had abandoned the claim of title as survivor of his brother.

The various letters from Elizabeth Travers, Elias Travers, and Mr. Fisher, in regard to the advances of each to Mrs. Wynne and the entries in the books of Fisher & Co. of repayment from Mrs. Wynne's portion of the rent, are all parts of the same transaction, showing that the agreement of distribution of rents had been entered into, and the payment of the fee of $400 to Mr. Webb out of the gross amount of the rents collected shows his connection as counsel and services rendered in behalf of all parties.

The letters from Mr. Fisher and Elias in connection with the visit to New Jersey during James Travers' last illness tend to show that Mr. Fisher, in connection with Elias, was acting for James in the interest of all the parties. Else why did he notify Elizabeth and why was he summoned to the deathbed? Testimony of this kind, showing and explaining what actually occurred, must be resorted to in default of direct evidence.

Estoppel is set up by those claiming under Elizabeth Travers and her sisters.

The heirs of Elias Travers claim title to the whole of the property leased to Freeborn G. Smith, which was part of that of which James Travers died seized. In this lease, which is executed with all the formalities of acknowledgments, the lessors are Elias Travers, Elizabeth Travers, Sydney V. Mitchell, and Mary Wynne, describing themselves as "the only heirs-at-law of James Travers, deceased," and the lease provides that rent is to be paid to them, and that at the end

of the term the property is to be surrendered to the lessors "and their heirs." In no way could the fact that Elias recognized that his sisters had an interest in fee in said lot be more clearly expressed. The intention of the lessors as to the capacity in which they conveyed is to be gathered from an inspection of the whole instrument. By this deed the heirs of Elias are estopped from claiming the entire estate to have been in their father.

Dundas *vs.* Hitchcock, 12 Howard, 265.

The action of Elias from the death of Joseph to the time of his death was such as to lead his sisters to believe that they had equal rights with him in the estates of James and Joseph, and relying on this action of Elias they took no further steps to assert such claim. The doctrine of equitable estoppel or estoppel *in pais* operates in favor of the sisters.

Dickerson *vs.* Colgrove, 100 U. S., 578.

Neither in pleading nor in testimony do the heirs of Elias give any explanation as to the condition which existed from the death of Joseph, in 1882, and the death of James, in 1883, to time of filing suit. They rest upon the claim that under the will of Nicholas Travers title is vested in them; yet for almost twenty years the property was in possession, through Fisher & Co., of the brothers and sisters equally, the rents collected and distributed equally between them, and such distribution acquiesced in by Elias and by his heirs for thirteen years after his death, which acquiescence is forcibly shown by the fact that as late as May 8, 1899, a bill was filed by certain of the heirs in the Supreme Court of the District of Columbia, in equity No. 20426, in which the parties and property involved are the same as in this cause, in which the title in fee simple as tenants in common of the descendants of the daughters of Nicholas Travers is not only admitted, but alleged. No claim is made nor any evidence offered that they ever asserted sole ownership during that

time. If all other defenses fail, the laches of Elias would make it a stale claim, not encouraged in equity, the courts uniformly declining to assist a person who has slept upon his rights and shown no excuse for his laches in asserting them.

Speidel *vs.* Henrici, 120 U. S., 387.
Brown *vs.* County of Buenavista, 95 U. S., 161.
Hammond *vs.* Hopkins, 143 U. S., 250.

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the time of action accrued, but whether under all the circumstances of the particular case the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

Townsend *vs.* Vanderwerken, 160 U. S., 171.

The courts now hold parties to a rigid compliance with the law, which demands not only that they should have been ignorant, but that they should have used reasonable diligence to have informed themselves of the facts.

Foster *vs.* Mansfield, 146 U. S., 88.
See, also, Halstead *vs.* Grinnan, 152 U. S., 412.

While the statute of frauds requires a contract concerning real estate to be in writing, equity will intervene and relieve the rigidity of the rule, and hold that a part payment removes the bar of the statute, and equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied with possession. If the case as stated is made out with reasonable certainty, it is all that is required. Any other degree of certainty in a case of this character is unattainable.

Neale *vs.* Neale, 9 Wallace, 1.

As between Elias and his sisters it is scarcely necessary to refer to any consideration moving for his action, as none such

would be required at law; but the fact, as stated by Mr. Webb, that the agreement was to put a conclusion in the mind of Elias that Joseph died seized of a fee simple in shape to be acted on, and that such action would end the long-standing controversy in the family as to the property is undoubtedly a good and most valuable consideration. Besides this, natural affection alone is a good consideration.

The receipt of rents by the Travers sisters constituted possession of the property on their part, and such possession was part performance of their agreement with James and Elias sufficient to take the case out of the statute of frauds. Such receipt of rents shows that the parties had entered into some contract in regard to the property, and the court by reason of such receipt of rent, without knowing whether there was an agreement or not, must find the parties unequivocally in a position different from that which according to their legal rights they would be in if there was no contract. Thus if one man without being amenable to a charge of trespass is found in possession of another man's land, such a state of things is considered as showing unequivocally that some contract has taken place between the parties (Browne on statute of frauds, sec. 455). It must be such an act done as appears to the court would not have been done except on account of the agreement, and must refer to and result from the agreement (same, sec. 454). The act of part performance must appear to be done with the direct view to performing the agreement and tend inceptively toward its accomplishment (same, sec. 457). Where the party alleging the contract was previously a stranger to the estate, the question *quo animo* is generally answered without further proof by the mere fact of his being in possession with the knowledge of the owner of the fee, and without objection by him; a natural presumption arises from this fact that some contract has been entered into between the parties (same, sec. 481). The possession must be subsequent to the agreement (same, sec. 482), and with the knowledge

of the vendor (same, sec. 483), and retained under the contract (same, sec. 485). Mere contrariety in the proof will not prevent the court from directing execution of the agreement, the principle being to collect from the proof, if it can, what the terms of the agreement really are (same, sec. 494).

It is submitted that the proofs in this cause fulfill all the requirements, as above set forth, necessary to establish the contention of those claiming under the Travers sisters and take the case out of the statute of frauds.

Respectfully submitted,

WILLIAM A. GORDON,
GEORGE E. HAMILTON,
M. J. COLBERT,
J. HOLDSWORTH GORDON,
For Appellees.